80-880

Supreme Court, U. S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1980

No. _____

CONTINENTAL OIL COMPANY *Petitioner*

V.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and SECRETARY OF LABOR
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Court by this Petition for Certiorari are:

1. Whether, under the facts of this case, Continental Oil Company, which has since changed its name to Conoco, Inc., (the "Petitioner") violated 29 U.S.C. § 654(a)(1), the "general duty clause" of the Occupational Safety and Health Act of 1970, (herein sometimes called the "Act").

2. What is the standard for determining whether an employer has violated the general duty clause?

3. Is the general duty clause, under the standard applied by the U.S. Court of Appeals for the Sixth Circuit, unenforceably vague in violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

4. Is the duty imposed upon employers by the general duty clause as interpreted by the U. S. Court of Appeals for the Sixth Circuit higher than that which Congress intended?

LIST OF ALL PARTIES
TO THE PROCEEDING

Continental Oil Company
(now Conoco, Inc.)

Occupational Safety and Health
Review Commission

Secretary of Labor
U. S. Department of Labor

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STATEMENT OF JURISDICTIONAL GROUNDS

(i) Judgment was entered in this cause by the U.S. Court of Appeals for the Sixth Circuit on September 2, 1980.

(ii) United States Court of Appeals for the Sixth Circuit entered an order denying Petitioner's Petition for Rehearing In Banc on November 4, 1980.

(iii) Jurisdiction to review this case by Petition for Certiorari is conferred by 28 U.S.C. § 1254.

STATUTE AND CONSTITUTIONAL PROVISION WHICH THIS CASE INVOLVES

29 U.S.C. § 654(a)(1)

Each employer - (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner operated a pipeline terminal facility in Chattanooga, Tennessee. Petroleum products were pumped into large tanks located at the facility from a common carrier pipeline. On September 25, 1972 one of these tanks overflowed and there was a resulting fire. Petitioner was cited inter alia for a violation of 29 U.S.C. § 654(a)(1), the general duty clause of the Act. The citation, in pertinent part, read as follows:

> The employer failed to furnish his employees working in the Southern Facilities Terminal on Jersey Pike in Chattanooga, Tennessee a place of employment which was free from recognized hazards that were causing or

were likely to cause death or serious physical harm to his employees in that:

(1) ...

(2) ...

(3) Automatic detection devices or persons were not employed to detect accidental discharge of flammables so that hazardous conditions that would endanger employees and others could be prevented.

Petitioner followed procedures which it had established for the purpose of receiving product from the pipeline and protecting against the occurrence of tank overflows. Briefly, these procedures consisted of the terminal manager ascertaining the product delivery schedule; maintaining contact with the pipeline; premeasuring and gauging the product in each tank to determine tank capacity; lining up the valves to direct the product to the correct tank; and being physically present at the terminal prior to the commencement of delivery and also at the termination of the delivery.

Nevertheless, the Secretary of Labor maintained pursuant to the above quoted charge that Petitioner should have employed other safety measures, to-wit: "high level alarms" on the tanks or should have had persons present at the facility at all times during delivery of product.

After a hearing held in accordance with the procedures established by the Act the Administrative Law Judge held inter alia that Petitioner had not violated the Act, concluding that the industry did not recognize high level alarms as a necessity for safe operations and that the industry did not consider it a hazard not to have persons present at all times during the pipeline deliveries.

On review, a divided Occupational Safety and Health Review Commission (the "Commission") on June 9, 1975 affirmed the decision of the Administrative Law Judge in this respect.

The Secretary of Labor petitioned the

United States Court of Appeals for the Sixth Circuit for review of the Commission's decision. On October 17, 1977 the Sixth Circuit remanded the case to the Commission on motion of the Secretary of Labor.

On remand, a newly constituted Commission on July 20, 1978 reversed itself and determined that the Petitioner had violated the general duty clause of the Act.

Petitioner petitioned the Sixth Circuit pursuant to 29 U.S.C. § 660(a) for a review of the Commission's second decision. On September 2, 1980, the Sixth Circuit affirmed the Commission, concluding that the Petitioner had violated the general duty clause. On November 4, 1980, the Sixth Circuit denied Petitioner's petition for a rehearing en banc.

BASIS FOR FEDERAL JURISDICTION

This case rises pursuant to the Occupational Safety and Health Act of 1970, 28 U.S.C. § 651 et seq., which confers appellate

jurisdiction upon the U. S. Courts of Appeal.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(a) The decisions of different Federal Courts of Appeal are in conflict with respect to the proper test which is to be used to determine whether an employer has violated the general duty clause.

The test utilized by the Sixth Circuit in this case approaches a strict liability standard. In the view of the Sixth Circuit, there is a "recognized hazard" when the employer has knowledge of an underlying safety risk. In this case, the "recognized hazard" was the admitted fact that spilled gasoline is hazardous. In a roofing case, the "recognized hazard" might be that falling off roofs is hazardous. Once such an obvious recognized hazard is established, either by reference to the employer's actual knowledge or by the standard of knowledge in the relevant industry, the employer is then required to do everything which the Secretary of Labor can prove is feasible to protect against that

hazard. This view is shared by the U.S. Court of Appeals for the District of Columbia. National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission, 489 F. 2d 1257 (D.C. Cir. 1973).

Other courts take a quite different view. Here the focus is upon whether the safety precautions taken (or not taken) by the employer is a "recognized hazard". In making this determination the courts subscribing to this view employ a "reasonable man" test. Moreover, the behavior of the reasonable man is to be governed by the practice of employers in the relevant industry. In B & B Insulation, Inc., 583 F. 2d 1364 (5th Cir. 1978), the Fifth Circuit said (at p. 1370 of 583 F. 2nd):

> Where the reasonable man is used to interpolate specific duties from general OSHA regulations, the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry. The purpose of the Act is preventive rather than compensatory. Achievement of its

goal of reducing industrial accidents depends upon employer compliance through elimination of legislatively identified safety and health hazards by prescribed remedial measures. Preventive goals are obviously not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident.

The Act indicates that Congress thought specificity of standards desirable. In light of the Act's preventive purpose and the intended specificity of its standards, the employer whose activity is not yet addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated in his industry should not generally bear an extra burden.

Where the Government seeks to encourage a higher standard of safety performance from the industry than customary industry practices exhibit, the proper recourse is to the standard-making machinery provided in the Act, selective enforcement of general standards being inappropriate to achieve such a purpose. The use of standard-making procedures assures that no only would employers be apprised of the conduct required of them and responsibility for upgrading the safety of the industry would be borne equally by all its members, but the resulting standard would benefit from imput of the industry's

> experts, both employer and employee, cost and technology obstacles faced by the industry could be weighed, and more interested parties can participate in the process.

B & B Insulation, supra, was a case involving a general safety standard promulgated under the Act. The court said, however, that the same approach would be taken with the general duty clause which is at least as imprecise as that of the standard there dealt with. Other Fifth Circuit cases taking this view, some of which deal with safety standards and some of which deal with the general duty clause itself are: R. L. Sanders Roofing Company, 620 F. 2d 97 (5th Cir. 1980); Power Plant Div. v. Occupational Safety and Health Review Commission, 590 F. 2d 1363 (5th Cir. 1979); Cotter & Company v. Occupational Safety and Health Review Commission, 598 F. 2d 911 (5th Cir. 1979); Getty Oil Co. v. Occupational Safety and Health Review Commission, 530 F. 2d 1143 (5th Cir. 1976).

The Fifth Circuit's view is shared by the Tenth Circuit, H-30, Inc. v. Marshall, 597

F. 2d 234 (10th Cir. 1979); and by the Seventh Circuit, Marshall v. L. E. Myers Company, 589 F. 2d 270 (7th Cir. 1978); Brennan v. OSHRC and Republic Creosoting Co., 501 F. 2d 1196 (7th Cir. 1974).

Still a third test is applied by other circuits. These courts also use the reasonable man standard. However, under their view the custom and practice in the relevant industry is evidence of, but not necessarily determinative of, what a reasonable man or "reasonably conscientious safety expert" would do. This view seems to be held by the Third Circuit, Voegle Company, Inc. v. Occupational Safety and Health Review Commission, 625 F. 2d 1075 (3rd Cir. 1980); the Ninth Circuit, Magma Copper Company v. Marshall, 608 F. 2d 393 (9th Cir. 1979); the Fourth Circuit, Bristol Steel & Iron Works, Inc. v. Occupational Safety and Health Review Commission, 601 F. 2d 717 (4th Cir. 1979); and the First Circuit, General

Dynamics v. Occupational Safety and Health Review Commission, 599 F. 2d 453 (1st Cir. 1979).

The Occupational Safety and Health Act of 1970 is an important statute. Its provisions intimately affect every phase of the business operations of Petitioner and other companies who operate in many areas of the country. Where none of the Act's specific safety standards apply, Petitioner and other employers are entitled to know by what standard they are to be judged. The diversity of the above holdings calls for the exercise of this Court's power of supervision.

(b) The general duty clause is unconstitutionally vague and therefore unenforceable under the due process clause of Fifth Amendment.

Enforcement of the general duty clause, 29 U.S.C. § 654 would violate the due process clause of the Fifth Amendment. This Court has long invalidated impermissibly vague

statutes under the Fifth and Fourteenth Amendment due process clauses. See, e.g. International Harvester v. Kentucky, 234 U.S. 216 (1914). Mr. Justice Sutherland first announced the current test for vagueness in Connally v. General Construction Co., 269 U.S. 385, 391 (1926):

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Therefore, to survive constitutional attack, the statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." 269 U.S. at 391.

Vague laws are most often said to offend due process for two reasons. First, because our judicial system assumes individuals have the freedom to choose between legal and

illegal conduct, our laws should be sufficiently definite for one to chart a course comporting with the law. Second, laws must be reasonably clear so that officials charged with administering the law will be unable to enforce the law in an arbitrary or capricious manner. See Thompson v. Southwest School District, 483 F. Supp. 1170, 1178 (W.D. Mo. 1980).

While the Connally case invalidated a criminal statute, this Court has applied the same test to non-criminal statutes, recognizing that indefiniteness in either type of statute fails to provide fair warning of proscribed conduct to affected individuals. See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also, Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1335-36 (6th Cir. 1978).

The Act and the regulations promulgated under it have spawned litigation in several circuits over whether various provisions were sufficiently definite to satisfy the Fifth Amend-

ment's due process standards. See, e.g., Lockrem v. United States, 609 F. 2d 940 (9th Cir. 1979); B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, 583 F. 2d 1364 (5th Cir. 1978); Diebold, Inc. v. Marshall, 585 F. 2d 1327, (6th Cir. 1978); Hoffman Construction Co. v. Occupational Safety and Health Review Commission, 546 F. 2d 281 (9th Cir. 1976); Cape and Vineyard Div., et al. v. Occupational Safety and Health Review Commission, 512 F. 2d 1148 (1st Cir. 1975); Ryder Truck Lines, Inc. v. Brennan, 497 F. 2d 230 (5th Cir. 1974).

In Hoffman Construction Co. v. Occupational Safety and Health Review Commission, supra, the Ninth Circuit considered the following regulation:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions and where this part indicates the need for using such equipment to reduce the hazards to the employees.

546 F. 2d at 283 (quoting 29 C.F.R. § 1926.28(a) (1972)). After noting that members of the Occupational Safety and Health Review Commission had placed three different interpretations on the regulation, the court refused to enforce a regulation so vague that it created no specific standard. The regulation itself contained no criteria for measuring an employer's conduct, and the surrounding regulations added nothing "to the reader's general intuition that workmen exposed to a height hazard need some protection." 546 F. 2d at 283. The court therefore reversed the Commission's assessment of a fine.

Similarly, the general duty clause, 29 U.S.C. § 654, is unconstituionally vague under the due process clause of the Fifth Amendment. The statute provides:

> (a) Each employer --
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or

> serious physical harm to his employees;
>
> ...

This statute is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., supra. As has been stated earlier, the United States Courts of Appeal have interpreted the general duty clause to have three different meanings. Compare, B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, supra with General Dynamics Corporation v. Occupational Safety and Health Review Commission, 599 F. 2d 453 (1st Cir. 1979) and Continental Oil Company v. Occupational Safety and Health Review Commission, No. 78-3445 (6th Cir. 9/2/80)(See Separate Appendix). If federal judges must necessarily guess at the general duty clause's meaning and differ as to its applications, certainly the average employer, also being a man of common intelligence, could hardly be expected to divine

what course of action Congress or the Secretary of Labor expects of him. Plainly, the statute does not warn employers what conduct will render them liable for the statute's penalties.

Rather, the general duty clause has become a post hac justification for penalizing an employer. As is evident, neither the general duty clause nor the several cases interpreting it have clarified the clause's standards for employers.

As the Field Operations Manual, published by the Occupational Safety and Health Administration, explains in outlining guidelines for inspectors (Compliance Safety and Health Officers):

> The general duty provisions should be used in inspections only where there are no specific standards applicable to the particular hazard involved....

CCH, OSHA Field Operations Manual, ¶ 4360.1 at 46 (January, 1979)(emphasis in original). The

general duty clause is, therefore, a catchall. However, this fact does not excuse its vagueness. No more striking instance could be found of a statute "so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork." L. Tribe, American Constitutional Law, § 12-28, at 718 (1978).

If Petitioner had known manned delivery systems or high level alarms were needed to warn of tank overflow, it would have received a constitutionally sufficient warning of the general duty clause's requirements. Diebold, Inc. v. Marshall, 585 F. 2d 1327, 1337 (6th Cir. 1978). But knowledge in the abstract that spilled gasoline may be hazardous does not constitute a recognition that manned delivery systems or high level alarms or systems are needed in the particular. A central purpose and policy of the Act is the elimination of dangerous conditions in the workplace "by encouraging employers...in their efforts to reduce

the number of occupational safety and health hazards." 29 U.S.C. § 651(b)(1). Obviously, unless he recognizes the particular hazard in his workplace, the employer cannot correct the hazard and, more importantly, should not be expected to correct it. Thus, because Petitioner did not recognize (nor did the industry recognize) that automatic detection devices or manned delivery were needed, no constitutionally sufficient warning existed.

It is also well-settled that judicial interpretations may save an otherwise unconstitutionally vague statute by supplying standards for the statute's application. See, e.g., Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940); B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, supra. But judicial construction of the general duty clause has only further obscured an already inscrutable statute. Instead of giving uniform content to

the term "recognized hazard" the Circuit Courts of Appeal have split, some focusing on the obviousness of the hazard in the abstract, while others stress whether the employer's conduct comported with what a reasonable man would do in similar circumstances (with some Circuits disagreeing over whether the reasonable man would be more cautious than employers in the relevant industry).

This vague and confusing statute illustrates dramatically the two previously mentioned policies for the constitutional requirement of definiteness -- to provide guidance for those subject to the statute as well as for those charged with its enforcement. An employer, especially one with a nationwide operation such as the Petitioner, can hardly be expected to intelligently conform his conduct to any specific standard when confronted with this morass of statutes, regulations, and contradictory judicial pronouncements. Furthermore, a local inspector walking through an employer's

plant can certainly summon no more order to this confusing state of affairs than the courts have done after secluded reflection. Without assistance from Congress, the courts or the agency, no standard serves to inform an inspector's discretion as he seeks to apply the general duty clause to a concrete factual setting. Nothing ensures that the nation's employers are being subjected to a uniform and definite standard that does not vary with the whims of individual inspectors. Due process requires at least this assurance.

(c) As it has been interpreted by the Sixth Circuit, the general duty clause is unconstitutionally vague and therefore unenforceable under the due process clause of the Fifth Amendment.

Only one judicial interpretation will save the general duty clause from being unconstitutionally vague under the Fifth Amendment. The Fifth Circuit has held, when confronted with

similarly vague regulatory provisions under the Act, that the reasonable man test must be implied into imprecise standards to offer at least the modicum of certainty required by the Constitution. See, e.g., Cotter & Co. v. Occupational Safety and Health Review Commission, 598 F. 2d 911 (5th Cir. 1979); Power Plant Division v. Occupational Safety and Health Review Commission, 590 F. 2d 1363, 1365 (5th Cir. 1979); B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, 583 F. 2d 1364 (5th Cir. 1978); Ryder Truck Lines, Inc. v. Brennan, 497 F. 2d 230 (5th Cir. 1974).

In B & B Insulation, Inc. v. Occupational Safety and Health Review Commission, supra, the Fifth Circuit considered the constitutionality of the following regulation:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using

> such equipment to reduce the hazards to the employees.

583 F. 2d at 1366 fn. 1 (quoting 29 C.F.R. § 1926.28(a)). After noting that due process required a "sufficiently definite warning as to the proscribed conduct," and recognizing that the Ninth Circuit in Hoffman Construction Co. v. Occupational Safety and Health Review Commission, 546 F. 2d 281 (9th Cir. 1976), had already ruled this regulation unconstitutionally vague, the Fifth Circuit declared:

> For the objectivity needed to rescue § 1926.28(a) from unconstitutional uncertainty, however, we look to cases construing analogous OSHA standards and to the tort law concept of the 'reasonable man.' ... The reasonable person approach...accords with congressional purpose as reflected in the general duty clause of the statute itself... The 'reasonable man' is, of course, a fictional character borrowed from tort law wherein his conduct sets the standard below which behavior constitutes negligence....Where the reasonable man is used to interpolate specific duties from general OSHA regulations,

> the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry. The purpose of the Act is preventive rather than compensatory. Achievement of its goal of reducing industrial accidents depends upon employer compliance through an elimination of legislatively identified safety and health hazards by prescribed remedial measures. Preventive goals are obviously not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident.
>
> The Act indicates that Congress thought specificity of standards desirable. In light of the Act's preventive purpose and the intended specificity of its standards, the employer whose activity is not yet addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated industry should generally not bear an extra burden.

583 F. 2d at 1369-71 (citations omitted).

As has been discussed earlier, the Sixth Circuit has refused to apply any of the various reasonable man standards adopted by the First, Third, Fourth, Fifth, Seventh, Ninth and

Tenth Circuit Courts. By failing to adopt any reasonable man standard, the Sixth Circuit has given no guidance to employers -- or inspectors -- in determining whether the employer's conduct accords with the general duty clauses requirements. Thus, the Sixth Circuit has failed in this case to construe the general duty clause in a manner that would save it from invalidity. Therefore, the general duty clause, as interpreted by the Sixth Circuit, is unenforceable against the Petitioner under the due process clause of the Fifth Amendment.

(d) The Sixth Circuit's interpretation of the general duty clause is not in compliance with the Act since it imposes a higher duty upon employers than can the Secretary of Labor by a promulgated safety standard.

The Sixth Circuit and the District of Columbia Circuit, National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission, 489 F. 2d 1257 (D.C. Cir. 1973), held that the general duty clause requires the employer to do what is feasible.

These cases do not define what is "feasible." The result is a general duty "standard" that is higher than any specific standard which the Secretary of Labor can promulgate under the Act. Marshall v. American Petroleum Institute, ___ U.S. ___, 65 L.Ed. 2d 1010, 100 S.Ct. ___ (1980). In the American Petroleum Institute case, supra, it was determined by a majority of the Court that Congress had not given the Secretary of Labor the power to promulgate a safety standard based upon criteria "limited only by the constraint of feasibility," 65 L.Ed. at 1037, however feasibility is defined. It was held that in promulgating safety standards, the Secretary of Labor was to consider the provisions of Section 3(8), 29 U.S.C. § 652(8), of the Act which defines an "occupational safety and health standard" as

> "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

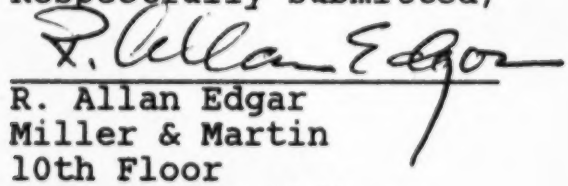
> reasonably necessary or appropriate to provide safe or healthful employment and places of employment." (emphasis supplied)

Surely it was never the intent of Congress to impose upon employers a higher duty through the general duty clause than the Secretary of Labor can impose through regulation. This, it is submitted, is an important question of federal law which has not been, but should be, settled by this Court.

STATEMENT PURSUANT TO RULE 28.4(b) OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

28 U.S.C. § 2403(a) may be applicable to this case. To Petitioner's knowledge, no court has certified to the Attorney General the fact that the constitutionality of an Act of Congress has been drawn in question in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of November, 1980, I served the above Petition for Certiorari on behalf of the Petitioner by depositing three (3) copies thereof in a United States post office or mailbox with first-class postage prepaid to all counsel of record and also to the Solicitor General at the following addresses, all in accordance with Rule 28 of the Rules of the Supreme Court of the United States:

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